

PRE-APPEAL BRIEF REQUEST FOR REVIEW		Locket Number: 06975-203001
	Application Number 09/894,918	Filed June 29, 2001
	First Named Inventor Brian Jacoby et al.	
	Art Unit 2143	Examiner Alina Boutah

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

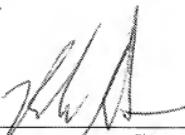
This request is being filed with a Notice of Appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

- applicant/inventor.
- assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b)
is enclosed. (Form PTO/SB/96)
- attorney or agent of record 41,265
(Reg. No.)
- attorney or agent acting under 37 CFR 1.34.
Registration number if acting under 37 CFR 1.34



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 February 9, 2007
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NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below.

Total of 6 forms are submitted.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Brian Jacoby et al. Art Unit : 2143
Serial No. : 09/894,918 Examiner : Alina Boutah
Filed : June 29, 2001 Conf. No. : 5947
Title : DEEP PACKET SCAN HACKER IDENTIFICATION

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Commissioner for Patents
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Alcxandria, VA 22313-1450

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Pursuant to United States Patent and Trademark Office OG Notices: 12 July 2005 - New Pre-Appeal Brief Conference Pilot Program, a request for a review of identified matters on appeal is hereby submitted with the Notice of Appeal. Review of these identified matters by a panel of Examiners is requested because the rejections of record are clearly not proper and are without basis, in view of a clear legal or factual deficiency in the rejections. All rights to address additional matters on appeal in any subsequent appeal brief are hereby reserved.

Claims 1, 3-7, 11-12, 16-17, 19-20, 22-26, 28, 30-31, 38-39, 41-45, 47, 49-50, 54-55, 57-62, 64 and 68-70 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Cox (U.S. 6,738,814) in view of Eichstaedt et al. (U.S. 6,662,230) and in further view of Maher, III et al. (U. S. 6,654,373), in further view of Alcendor (U. S. 6,337,899).

Applicant respectfully traverses these rejections.

Applicant does not concede that the previously submitted affidavits are insufficient to show diligence during the critical period. However, Applicant does not raise that issue at this point. Rather, Applicant is focusing the questions addressed in the pre-appeal request for review to those issues believed to be most suitable for a pre-appeal request for review. Accordingly, Applicant asks the panel to review the following two issues:

1. Cox, Eichstaedt, Maher and Alcendor, either alone or combined as proposed, fail to disclose or suggest "monitoring, at the network device, at least the payload portion of the data packets directed from at least one of the access providers to at least one of the access requestors by scanning the payload portion for at least one predetermined pattern and counting a number of data packets having payload portions that include the predetermined pattern; and using the network device to deny subsequent data packets from the access requestor to the access provider

when a number of payload portions of the data packets received from the access provider to the access requestor is deemed to include the predetermined pattern exceed a configurable threshold number", as recited in claim 1, and similarly recited in claims 20, and 39.

2. The Examiner's reasoning based on improper hindsight reconstruction is improper.

Discussion of Issues:

1. Cox, Eichstaedt, Maher and Alcendor, either alone or combined as proposed, fail to disclose or suggest "monitoring, at the network device, at least the payload portion of the data packets directed from at least one of the access providers to at least one of the access requestors by scanning the payload portion for at least one predetermined pattern and counting a number of data packets having payload portions that include the predetermined pattern; and using the network device to deny subsequent data packets from the access requestor to the access provider when a number of payload portions of the data packets received from the access provider to the access requestor is deemed to include the predetermined pattern exceed a configurable threshold number", as recited in claim 1 and similarly recited in claims 20, and 39.

In independent claim 1, Applicant claims a method that includes, *inter alia*, monitoring, at the network device, at least the payload portion of the data packets directed from at least one of the access providers to at least one of the access requestors by scanning the payload portion for at least one predetermined pattern and counting a number of data packets having payload portions that include the predetermined pattern; and using the network device to deny subsequent data packets from the access requestor to the access provider when a number of payload portions of the data packets received from the access provider to the access requestor is deemed to include the predetermined pattern exceed a configurable threshold number.

Applicant respectfully requests reconsideration and withdrawal of the rejection because not any one of the four references, Cox, Eichstaedt, Maher and Alcendor, nor any possible combination of these references, discloses or suggests the feature of denying subsequent data packets from access requestors based on the results of monitoring the payload portion of the data packets directed from access providers, as claimed.

On the record, Applicant has illustrated that all four references fail to teach the feature above. However, the advisory action provides no new arguments in response to Applicant's illustration and merely relies on the "combination as cited in the previous rejection".

Applicant further illustrates an aspect of this feature recited by claim 1 using FIG. 1. below:

Step 1: The Network Device monitors Y_{x1} , a data packet from the Access Provider Y to Access Requester X to determine whether it has a predetermined pattern.

Step 2: The Network Device denies X_2 , a data packet from the same Access Requester X if the number of data packets Y_{x1} from Access Provider Y to Access Requester X having the predetermined pattern exceeds a threshold.

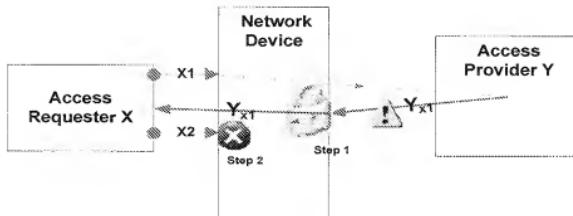


FIG. 1 Claimed method

Cox fails to teach step 1 of FIG. 1 above. In fact, Cox never monitors data packets from Access Provider Y. In contrast, Cox monitors solely data packets from the Access Requestor X. More specifically, as shown in FIG. 2 below, Cox denial of service decision is based solely on data packets from the incoming packets X1, X2 from the Access Requestor X.

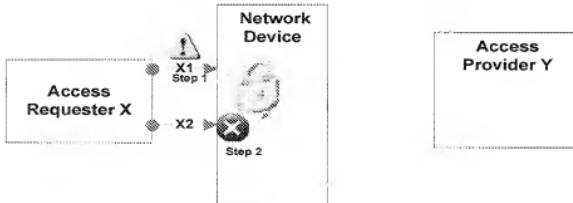


FIG. 2 Cox's method

The Office Action of 08/09/06 also acknowledges that Cox fails to suggest the features cited above. "Cox also fails to explicitly teach monitoring the payload portion of the data

packets directed from at least one of the access providers to at least one of the access requestors..." See., e.g. page 5 of the Office Action of 08/09/06.

The Office Action of 08/9/06 similarly fails to rely on either of Eichstaedt or Maher for this feature, instead relying exclusively on Alcendor for the teaching of this feature. However, Alcendor also fails to teach this feature. Yet the Office Action and Advisory Action fail to make a *prima facie* case of obviousness capable of withstanding scrutiny, as each fails to set forth motivation for a combination of Alcendor and Cox.

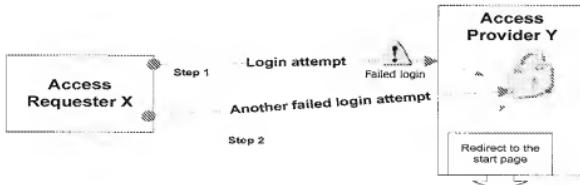


FIG. 3 Alcendor's method

More specifically, Alcendor merely describes a method of authenticating users in telephony response systems, where users are temporarily inconvenienced to reselect the desired service after a number of failed login attempts, *see*, e.g., paragraph 2-3 of column 7 and Fig. 4 of Alcendor, also shown in FIG. 3 above, Alcendor only monitors the number of failed login attempts of a user; Alcendor does not monitor data packets from the access providers.

Additionally, in the response to the non-final Office action of 02/03/06, Applicant further clarified the distinction from Alcendor by pointing out that Alcendor lacks the use of an intermediary network device, as required by claim 1. By way of example, Alcendor does not disclose anything that relates to data packets, much less on monitoring the data packets directed from the access providers. Such additional distinction further demonstrates that Alcendor's system has a different structure and solves a different problem. This deficiency alone makes Alcendor unable to cure Cox's deficiency.

Therefore, the proposed combination of Alcendor, Cox, Eichstaedt and Maher is deficient for failure of any of these references to teach or suggest the feature of denying subsequent data packets from access requestors based on the results of monitoring the payload portion of the data packets directed from access providers, as claimed in independent claim 1, and similarly independent claims 20 and 30.

2. The Examiner's reasoning based on improper hindsight reconstruction is improper.

The Examiner points out that reconstruction is proper so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made. Applicant does not dispute this point. However, Applicant nevertheless finds the reconstruction used by the Examiner to be improper, or at least without a proper basis.

The cited rules of law itself clearly specify the need for reconstruction to take account of only knowledge which was within the level of one of ordinary skill at the time of the invention. To establish a *prima facie* case of obviousness, the Examiner must therefore demonstrate that the level of knowledge available to those of ordinary skill at the time of the invention supports his hindsight reconstruction. The Examiner has not done so.

As indicated above, none of the art of record suggest the feature of denying subsequent data packets from access requestors based on the results of monitoring the payload portion of the data packets directed from access providers, and the Examiner has not demonstrated that those of ordinary skill at the time of the invention would have had knowledge of this very feature.

In view of the above, all of the claims should be in condition for allowance A formal notice of allowance is thus respectfully requested.

Please apply any charges or credits to Deposit Account No. 06-1050.

Respectfully submitted,

Date: 2/9/07

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